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Reporting PFAS: reporting burden is the least of businesses' worries

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Ask just about anyone doing business in the US making or importing products that contain chemicals what they think about the US Environmental Protection Agency's (EPA's) new per- and polyfluoroalkyl substance (PFAS) reporting rule, and you will get a decidedly grumpy response. Granted, no businessperson welcomes any new chemical reporting obligation, but by any standard, the EPA's 11 October 2023 final PFAS reporting rule is problematic and is inviting uniquely scathing criticism.

As deserving as some believe the criticism may be, this article argues that the reporting burden is not the issue on which businesses should be focused. Rather, the rule's prompting of public disclosures regarding the presence of any amount of PFAS in a company's products, and the legal and reputational consequences that flow from that disclosure, are what should be top of mind.

The very real prospect that the reporting rule will create a brand affiliation with PFAS is worth stressing over. This article offers a high-level overview of the new reporting requirements and key issues on which businesspeople should be focused.

Background

The PFAS reporting rule implements a provision in the 2020 National Defense Authorization Act (NDAA). The law requires all manufacturers, including importers, of PFAS and PFAS-containing articles (manufactured products or goods) in any quantity, in any year since 2011 to report to the EPA information related to chemical identity, uses, volumes made and processed, byproducts, environmental and health effects, worker exposure and disposal.

According to the EPA, at least 1462 PFAS are known to have been made or used in the US since 2011; all are subject to the final reporting rule, but the actual number is likely much higher. Due to definitional variation, this number pales in comparison with the Organization for Economic Cooperation and Development (OECD) definition of PFAS used in the European Union (EU), which includes over 10,000 PFAS, but it is still a lot.

Surprisingly, the EPA's June 2021 proposed reporting rule interpreted Congress' NDAA mandate literally, and the EPA proposed to disallow the customary exemptions from reporting long offered in similar Toxic Substances Control Act (TSCA) rulemakings. Had the EPA followed past practice, it would have excluded from reporting PFAS used for research and development (R&D) purposes, the coincidental manufacture of PFAS as a byproduct or impurity, the use of PFAS as an intermediate, and the import of PFAS in an article, and EPA would have set a *de minimis* threshold below which reporting would be excused.

Similarly, as in years past, the EPA would have offered small business entities relief in a variety of forms. In defending the final rule, the EPA offers that submitters may report that information is "not known or reasonably ascertainable", while giving short shrift to the burden of determining what is known or reasonably ascertainable.

Industry's response to the EPA's proposal was predictably harsh. Hundreds of commenters urged the EPA to reconsider its 'no exemptions' policy, to identify a discrete list of PFAS on which to report, or otherwise to recraft the proposal to be more focused on eliciting meaningful risk information to guide the EPA's regulatory decisions.

The US Small Business Administration launched a major assault against the proposal. Its advocacy forced the EPA to acknowledge that it had grossly underestimated implementation costs. The EPA estimated those costs to be $10.8m and later revised it upward 80-fold to $875m. Given this embarrassing miscalculation, the tsunami of adverse comments, the unusually long delay between issuance of the proposed rule and the final rule (10 months past the statutory deadline for issuing the rule by 1 January 2023), many in industry speculated that the EPA would relent and lighten up on the reporting burden.

The final rule

The final rule expands the structural definition, does not provide a *de minimis* reporting threshold, does not allow the customary exemption for byproducts, articles, impurities or R&D, nor offers significant relief for small business entities. It does offer streamlined reporting features for article importers, more time for small business entities, and other accommodations, but most would agree the relief is insufficient and the burden on industry is crushingly heavy, given the paucity of information the rule is likely to elicit.

The EPA has publicly pushed back by reminding entities subject to the rule that the reporting standard is scaled to require only information "known to or reasonably ascertainable [KRA] by the manufacturer", the standard used in other similar TSCA rules, defined as "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know".

The EPA acknowledges this standard "carries with it an exercise of due diligence, and the information-gathering activities that may be necessary for manufacturers to achieve this reporting standard may vary from case-to-case". The EPA notes, however, this standard requires entities to evaluate their current level of knowledge of their manufactured products (including imports) and to evaluate whether there is additional information that a reasonable person would be expected to know, possess or control. Who decides what diligence is due? To many, the EPA's guidance is ambiguous, and the EPA will certainly be the final arbiter – another reason industry stakeholders are nervous.

The rule takes effect almost immediately, and entities will have 18 months following 13 November 2023 to report. More time is given to small business entities.

The importance of being strategic

Much is being made of the extraordinary burden on business to retrieve, review and report on the presence of PFAS in products made or imported years ago when PFAS was not on anyone's radar. While it is true that this is nearly impossible to achieve, industry needs to get over it and keep its eye on the greater commercial and legal challenges the rule invites. Key considerations that should be top of mind include those outlined below.

First, reporters must develop a legally defensible due diligence protocol. While the legal reporting standard of KRA is facially understandable, its application to a company's operations is not. Companies need to develop a due diligence protocol that is defensible and consistently deployed throughout a reporter's operations. If one corporate division develops a customer survey to elicit information and other divisions do not, inferences adverse to the company will arise from this disparity. If information is not 'reasonably available', reasonable estimates may be used. How such estimates are calculated, however, needs to be defined and applied consistently throughout an entity's entire operations.

Similarly, it must be clear under what circumstances a company will report that categories of information are not KRA. Different divisions of the same company will be at legal risk if they interpret these terms differently or in ways that cannot be reconciled with the reporting standard. Inconsistencies in any of these areas will make a company vulnerable to legal challenge. Variation could also be the subject of third-party discovery in judicial actions based on claims of injury from PFAS exposure.

Second, companies must anticipate and prepare for the immediate consequence of their PFAS reporting disclosures, even if the company name is protected as confidential in a submission. Reasonable people can disagree on whether all PFAS are unacceptably toxic, but there is general agreement on the fact they are ubiquitous. Many subject to the reporting obligation may be ambushed by the new knowledge if PFAS, harmful or not, are contained in their products, and the legal duty to report this information publicly is not trivial. Managing the consequences of this public disclosure is critically important, as stakeholders, including customers, retailers, shareholders, employees, insurers, investors, sponsors and others may be ill-prepared for these revelations and deeply unhappy about them.

Depending on a company's place in the supply chain, these disclosures raise critical

questions that must be addressed. If a supplier did not know its product contains PFAS, it may now need to inform its customers. If a trusted brand did not know its consumer product contains PFAS, it now needs to manage that information and communicate it to its customers to maintain the trust it has worked hard to earn. Developing a thoughtful communications strategy is essential.

More fundamentally, commercial transactions may need to adjust. Pivoting to new suppliers and innovating new PFAS-free product formulations, if that is the option selected, are neither easy nor quick solutions. Crafting a compelling defence of the presence of PFAS in a product requires scientific support. In short, anticipating the many issues the reporting obligation will trigger requires careful and strategic thinking at multiple company levels.

Third, the federal reporting obligation must be aligned with the growing number of state reporting obligations and bans of products that contain intentionally added PFAS. A growing number of states have enacted disclosure requirements and accompanying bans of product categories containing PFAS. Companies must satisfy all these reporting obligations holistically. There is extraordinary variation in how key terms are defined that make this obvious goal far more complex than it would seem. States tend to define PFAS differently, for example, and what triggers disclosure is not consistent across state laws; these laws are not consistent with federal reporting obligations. Inattention to these important differences will make a company legally vulnerable.

Conclusion

We live in a world laser focused on PFAS. The EPA's reporting rule has made life more complicated and doing business in it riskier. Yes, the burden it imposes is unwelcome, but industry must get over it. Focused attention to detail, developing thoughtful communication strategies and defensible reporting protocols are the topics that should be top of mind. ■